STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-700

March 30, 1999

BANGOR HYDRO-ELECTRIC COMPANY
Request for Approval of Employee Transition Plan for Benefits and Services

ORDER

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

In this Order we approve Bangor Hydro-Electric Company's Employee Transition Plan for Benefits and Services.

II. BACKGROUND

Our January 14, 1999 Order (Order) in this matter set forth a detailed description of the background of this matter and will not be repeated here. (A copy of the Order is attached as Exhibit A.) In that Order, we delayed final consideration of Bangor Hydro Electric Company's (Bangor Hydro or BHE) plan because we believed that an ambiguity in section 3216 raised several important questions on which we wanted further comment.

Specifically, we noted that Bangor Hydro's plan excludes from eligibility for the statutory benefits all Bangor Hydro employees who are offered a comparable job by the unaffiliated company which will buy Bangor Hydro's generating assets (new owners). Section 3216 specifically excludes from eligibility employees who are transferred within the utility or to an affiliated company, but it is silent on the issue of eligibility for employees who are offered a job with an unaffiliated entity which acquires a utility's generating assets.

We believed that it was unclear whether the Legislature intended to make employees hired by the new owner eligible for benefits by not including them in the specific exclusion applicable to affiliated companies, or whether they intended to exclude those employees because they believed the term "laid off," used to define eligibility for the benefits, would not cover employees who were offered comparable employment by the new owners. Thus, we requested additional briefing on the following questions:

(1) Discuss and analyze whether, under 35-A M.R.S.A. § 3216, employees who are offered employment by the new owners are included or excluded from eligibility for statutory transition benefits.

(2) Discuss how the term "laid off" is defined for labor law and other relevant purposes, and provide specific citations if available. Please also discuss how any such

standard definitions should affect the determination of the Commission as to whether 35-A M.R.S.A. § 3216 includes Bangor Hydro employees who are offered a comparable job with the new owners within the class of employees eligible for transition benefits.

We received comments from Bangor Hydro, the International Brotherhood of Electrical Workers Local 1837 (Union), the Office of the Public Advocate (OPA), and Maine Public Service Company (MPS).

III. POSITIONS OF THE PARTIES

A. BHE, MPS and OPA

BHE, MPS and OPA argue that the Legislature intended to provide transition benefits only to those employees who were laid of, in the sense that they were left without employment, and not to those transferred or immediately rehired by the new owners of the generating assets. BHE points to the legislative history's reference to "displaced" workers as evidence that only workers who lost their jobs and were not rehired by the new owners were covered. BHE also argues that the statute was intended to be a safety net for employees who fall through the cracks of divestiture, not a windfall to employees who continue to work in the same location, at the same job, and at the same pay and benefits. BHE, OPA, and MPS all argue that the types of benefits offered under the statute confirm the Legislature's intent to cover only those workers who became unemployed. Specifically, MPS points out that the bulk of the benefits are aimed at retraining workers and allowing them to continue health benefits; providing these benefits to workers rehired by the new owners would make little sense.

MPS also points out that the Commission's current rule provides for transition benefits to employees who are hired by the new owner but subsequently laid off prior to December 31, 2001. Unless the rule is changed, an employee might be eligible for benefits twice within a year. MPS believes that this "is an obviously silly result."

B. Union

The Union argues that because the Legislature specifically provided that employees hired by affiliates of the original company do not qualify for benefits, it must have intended to provide benefits to all others, including those hired by unaffiliated new owners. The Union argues that the Legislature made a conscious and clear choice and that everyone involved in the passage of Section 3216 recognized the potential difficulties of workers transferred to an unregulated power generator who might "drastically change employment practices or fail in unregulated competition."

The Union also argues that because the Legislature "must" have been aware that both the federal Workers Adjustment Retraining Notice Act (WARN) and the Maine Severance Pay Statute do not provide for severance benefits if an employee is rehired, the Legislature "specifically provided that employment, except with the same or an affiliated employer, would not disqualify the employee from the definition of an eligible employee which is the key to severance pay rights under the Electric Restructuring Act." Finally, the Union cites Bellino v. Schlumberger Technologies, Inc., 944 F.2d 26 (1st Cir. 1991), as support for its position that the term layoff does not require a period of

unemployment and that a layoff occurs if a company is sold to another company and the employees are immediately rehired by the new owners.

IV. DECISION

A. Transferred Employees Are Not Eligible For Benefits

We have reviewed the parties' submissions, the case law cited, and additional case law we found on the subject. While the Union has offered a plausible basis for concluding that employees transferred to unaffiliated new owners should be eligible for benefits, we find the arguments of BHE, OPA, and MPS that such employees are not eligible to be more consistent with the statutory scheme established by the Legislature in 35-A M.R.S.A. § 3612.

First, with regard to the case law concerning the definition of the term "layoff," we find that while some cases addressed situations very similar to that before us, the cases were split on whether the sale of a company's assets qualifies as a layoff which triggers a right to severance benefits. In each case, the court focused on the specific language of the company-sponsored benefit plan it was interpreting and the particular circumstances which lead to the lawsuit. Thus, we find that there is no absolute rule of law or any controlling precedent on the meaning of the term layoff.

We agree with BHE, OPA, and MPS that the types of benefits required by the statute indicate that the Legislature intended to protect workers who actually lost their jobs and became unemployed because of restructuring, not those who merely changed employers. Indeed, four of the benefits appear to assume unemployment, i.e., retraining and outplacement, tuition, health benefits, and ability to maintain fringe benefits. We also note that the statute requires, and BHE's plan provides, that a transferred employee's job, salary, and benefits, must be comparable to those the employee enjoys at his current job. Finally, the statute requires that the new owners recognize any collective bargaining agreement in effect with the current employer, and thus, employees should not lose any Union benefits because of the transfer.

The overall legislative scheme of the Electric Restructuring Act demonstrates the Legislature's intent to ensure that ratepayers are not burdened with additional costs associated with restructuring. If we were to adopt the Union's interpretation of the statute and apply that interpretation to CMP, MPS, and BHE, more than $11 million in additional employee benefits transition costs would be passed on to ratepayers. These costs would cover providing severance pay, tuition, retraining, and health benefits to employees who continued to work at the same jobs and the same pay and benefits levels as they always have. We do not believe that the Legislature intended for ratepayers to bear that burden.

We also note that our Rule provides that if the new owner lays off a transferred employee before December 31, 2001, that employee will be eligible for transition benefits, the same as if the employee had remained with the utility and been laid off by the utility. Thus, transferred employees are in the same position as non-transferred employees with regards to qualification for benefits if they actually become unemployed as a result of restructuring.

B. We Will Not Address The Setoff Issue

BHE, MPS, and the Union also addressed the issue of whether the utility can set off the statutory benefits with benefits required by a collective bargaining agreement (contractual benefits) and *vice versa*. BHE and MPS essentially argue that statutory and contractual benefits are not cumulative, that the payment of one may count as payment of the other. BHE claims that the statute allows it to satisfy its statutory obligation through payment of contractual benefits and that the Commission has no jurisdiction over whether contractual benefits could be satisfied through payment of statutory benefits because the Commission is not a party to the contract. MPS, on the other hand, argues that the statute permits it to offset contractual benefits with payment of statutory benefits but precludes the offset of statutory benefits with contractual benefits because the contractual benefits are a creation of federal law that cannot be modified by state statute. The Union argues that the benefits are cumulative -- the utility must pay both the statutory benefits and the contractual benefits.

We find that the statute is silent on the issue of setoff, whether setoff of contractual benefits with statutory benefits or *vice versa.* The statute is clear that the utility's plan must include the statutorily mandated benefits and that those benefits must be provided if an employee meets the eligibility requirements. As we said in our Order approving the MPS plan, we are not in a position to determine whether provision of the statutory benefits impacts a utility's responsibility for payment of similar contractual benefits. We are able to mandate the provision of the statutory benefits, which is what we do today by approving BHE's plan. We do not believe we are the appropriate forum to determine whether BHE must provide cumulative contractual benefits. We wish to make clear, however, that regardless of what any other forum might determine, the statutory benefits must be provided to all eligible employees without regard to any limitations contained in any collective bargaining agreement that might be used to satisfy the statutory benefits requirements.[1]

Dated at Augusta, Maine this 30th day of March, 1999.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl

[1] An example may be helpful. Assume that another adjudicatory body finds that BHE may satisfy its statutory obligations through payment of contractual benefits. If the collective bargaining agreement limited a particular employee's contractual benefits in any way which would cause the contractual benefits to be less than the statutory benefits, then BHE must supplement the contractual benefits with any additional benefits necessary to meet all the statutory requirements. BHE may not claim that an eligible employee is entitled to less than full statutory benefits because of contractual limitations applicable to that employee.

Administrative Director

COMMISSIONERS VOTING FOR: WELCH
NUGENT
DIAMOND

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of adjudicatory proceedings are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 6(N) of the Commission's Rules of Practice and Procedure (65-407 C.M.R.11) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which consideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320 (1)-(4) and the Maine Rules of Civil Procedure, Rule 73 et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320 (5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.